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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 24

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,

Petitioner,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee Under Indenture Dated the 21st Day of March 1928, Between Charles L. Cobb and The Chase National Bank of the City of New York, *et al.*

BRIEF FOR ARTHUR J. O'LEARY, GUARDIAN AD LITEM FOR INFANT RESPONDENTS HANS ULRICH SCHWARZBURGER, ELIZABETH SCHWARZBURGER, HANS ADOLF ROTH, HEIDE ROTH, CHRISTEL ROTH, EIKE ROTH, UWE ROTH, ECKARD ROTH, HANS EBERHARD SCHWARZBURGER, SABINE SCHWARZBURGER, BERND VOM BAUR, CHRISTOPH ROTT, TILO KOSTER AND SITTA KOSTER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Petitioner,

v.

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BRIEF FOR ARTHUR J. O'LEARY, GUARDIAN AD LITEM FOR INFANT RESPONDENTS HANS ULRICH SCHWARZBURGER, ELIZABETH SCHWARZBURGER, HANS ADOLF ROTH, HEIDE ROTH, CHRISTEL ROTH, EIKE ROTH, UWE ROTH, ECKARD ROTH, HANS EBERHARD SCHWARZBURGER, SABINE SCHWARZBURGER, BERND VOM BAUR, CHRISTOPH ROTT, TILO KOSTER AND SITTA KOSTER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Solicitor General on behalf of Herbert Brownell, Jr., Attorney General applies for a writ of certiorari to review the judgment of the Supreme Court of New York County, dated July 5, 1955. This brief is submitted in opposition to that application.

Question Presented

The sole question presented by the Attorney General's application for a writ of certiorari is the following:

Whether this Court, in its decisions in *Brownell* v. *Singer,* 347 U. S. 403 and *Zittman* v. *McGrath,* 341 U. S. 471, has so construed the Trading with the Enemy Act, 50 U. S. C. App. sees. 1 *et seq.,* as to require the New York Supreme Court, in an accounting proceeding brought at the request of the Attorney General (R. 18, 23), to oust itself of jurisdiction of a continuing *inter vivos* trust (R. 160), which is being administered under its supervision by a New York bank as trustee (R. 70), by directing said trustee to transfer to the Attorney General, as successor to the Alien Property Custodian, the accumulated income and corpus of said trust pursuant to an amended vesting order which was filed with the Federal Register on April 9, 1953 (R. 64), a date 18 months after formal termination of the war with Germany (65 Stat. 451; Proclamation 2950, 50 U. S. C. A. App. p. xx), where the following circumstances clearly exist:

(a) that the trust was created on March 21, 1928, long before any freezing or vesting order was made (R. 21);

(b) that one of the remaindermen of the trust is an United States citizen by birth (R. 159, Pl. Ex. 10, R. 253, 186), who was in being prior to the time the amended vesting order was made (R. 159);

(c) that all the remainder interests in the trust are contingent (R. 160);

(d) that the remedy provided by Section 9 of the Act is illusory and inadequate in the instant case (this brief, pp. 9-10);

(e) that there has been a prior judicial proceeding relating to this trust in the New York Supreme Court in which the Attorney General intervened and in which judgment was entered to the effect that said Attorney General is not entitled to the income of said trust and had no authority to exercise the fiduciary powers reserved to Bruno Reinicke, Jr., but that the trustee bank had authority to exercise such fiduciary powers (Pl. Ex. 3, R. 211-223, 183-184; Pl. Ex. 4, R. 229, 184; Pl. Ex. 5, R. 231, 184).

It is respectfully submitted that this Court has not so construed said Act either in the cited decisions or in any other decision.

Reasons for Denying the Writ

The action of the New York courts in this case is in harmony with the Trading with the Enemy Act and is not in conflict with the rule in *Brownell* v. *Singer*, 347 U. S. 403, nor with the rule in *Zittman* v. *McGrath*, 341 U. S. 471. Neither of these two cited cases upon which the petitioner relies is applicable here.

1. The instant case must be distinguished from *Brownell* v. *Singer, supra,* and *Zittman* v. *McGrath, supra,* because of important, relevant, essential and outstanding differences. We are not dealing here with enemy owned property; we are dealing with property owned since 1928 by a New York trust com-

pany, which is held on *inter vivos* trust for the benefit of at least one American citizen, which is in the process of administration under judicial supervision and which is not "payable or deliverable to, or claimed by a designated enemy country or national thereof" (Ex. Ord. 9095 as amended, 50 U. S. C. A. App. sec. 6, pp. 43-44). In the *Singer* case the Custodian vested the *res* consisting of funds that had been on deposit in an agency of an enemy alien bank. The Courts of New York adjudged that Singer had a preferred claim on those funds the payment of which was conditional upon Singer obtaining a license from Federal Authorities. (*Singer* v. *Yokohama Specie Bank,* 299 N. Y. 113, affirmed *sub nom. Lyon* v. *Singer,* 339 U. S. 841, 94 Law ed. 1323.) But the Alien Property Custodian denied a license to Singer and served a directive that the Superintendent of Banks of New York turn over to him the $557,561.25 that had been allocated and set aside out of the enemy alien's funds as a reserve for the payment of Singer's preferred claim. The New York Superintendent of Banks applied at Special Term of the Supreme Court for an order authorizing him to turn over the funds to the Alien Property Custodian. That application was denied. Special Term held that while the funds could not be paid to Singer, who had been denied a license, neither should the funds be paid over to the Alien Property Custodian. It was held that this allocated fund for payment of a preferred claim did not constitute "excess proceeds" of the Yokohama Specie Bank and were not encompassed by the Vesting Order of 1943 whereby the Custodian had vested "excess proceeds"—that is proceeds over and above the amounts of approved and allowed claims. Special Term also observed that *Lyon* v. *Singer,* 339 U. S. 841, which

affirmed a judgment adjudicating that Singer had a preferred claim, with payment conditioned upon obtaining a license, does not mean that a license may be arbitrarily withheld. (*In re Yokohama Specie Bank,* 200 Misc. 610; affirmed no opinion, 280 App. Div. 970; affirmed no opinion, 305 N. Y. 908.) On appeal by the Attorney General to the Supreme Court of the United States, the judgment of the New York Courts was reversed with a *per curiam* opinion, reading:

> "Reversed. *Zittman* v. *McGrath,* 341 U. S. 471, 95 Law ed. 1112, 71 S. Ct. 846." (*Brownell* v. *Singer,* 347 U. S. 403, 98 Law ed. 803.)

There is a dissenting opinion by Justice Jackson with whom Justice Frankfurter and Justice Douglas join.

What was decided and all that was there decided is that the Custodian was entitled to the possession of all the funds in the hands of an agency of an enemy alien even though a creditor had a preferred claim against those funds. That decision has no application to this case which does not involve funds on deposit with an agency of an enemy alien and has nothing to do with creditors or preferred claims.

We turn now to *Zittman* v. *McGrath,* 341 U. S. 471, 95 Law ed. 1112. There the petitioners had levied an attachment against the accounts of the Deutsche Reichsbank with the Federal Reserve Bank of New York and thereafter obtained default judgments against the Reichsbank but the judgments remained unsatisfied because of the freezing program. The Alien Property Custodian issued a Vesting Order

whereby he vested in himself the "right, title and interest" of the German banks and also served on the Federal Reserve Bank a "turnover directive" describing the specific property which he required to be turned over to him "to be held administered and accounted for as provided by law." As Justice Jackson stated, 341 U. S. 471 at 473, the Custodian in the relief asked for "omits any request for a declaration that the attachments are invalid. He asks a decree only that Custodian is 'entitled to possession' of the accounts in their entirety". What was decided there is stated in these words (p. 474):

> "In view of these facts, we decide and decide only, that the Custodian has power to possess himself of these funds and to administer them."

The Federal Reserve Bank, a stakeholder had no interest in the funds so ordered to be turned over; these were the funds of the Reichsbank. An attachment, so it was held, does not deprive the Custodian of his power to possess and administer funds of an enemy alien. But in our case we are not dealing with enemy funds nor credits to an enemy alien's account in a New York bank, nor is there any question of the validity or invalidity of attachments. Here the Custodian is not seeking possession of a fund of an enemy alien to be administered for creditors. He seeks possession of the assets of a New York trust held, owned and being administered by a New York trust company under the supervision of the New York Supreme Court. No enemy alien owns the assets of the trust and they are not "payable or deliverable to or claimed by a designated enemy country or national thereof" (Ex. Ord. 9095 as amended). The interests of the enemy aliens are of a contingent nature capable

of ascertainment and measurement only upon the termination of the trust and such interests may never ripen into ownership (R. 160). Moreover contingent remaindermen are not entitled to ownership, or possession or control of trust assets.[1]

The petitioner asserts that the Custodian's 1945 Vesting Order in the instant case (R. 67-72) is similar to the "right, title, and interest" vesting order in the first *Zittman* case, 341 U. S. 446, and to the "excess proceeds" order in the first *Singer* case, 339 U. S. 841. Then he asserts that the 1953 amended vesting order is a vesting of *res*, similar to the "turn-over directives" in the second *Zittman* and *Singer* cases, 341 U. S. 471 and 347 U. S. 403. From that stated similarity the petitioner erroneously concludes that he is entitled to immediately take possession and administer assets of an *inter vivos* trust, which is being administered under judicial supervision, which are not owned by aliens and not in the possession of aliens, and which are not "payable or deliverable to or claimed by a designated enemy country or national thereof" (Ex. Ord. 9095 as amended). What was vested in the *Zittman* and

[1] Since the trust indenfure contemplates administration by a New York trust company in New York (R. 21, 153), but also provides that the trust shall be performed in accordance with the laws of the State of Illinois (R. 48), the nature of the respective interests and rights of the trustee and of the cestuis, respectively, in the corpus of the trust is governed by either New York law or Illinois law. If the New York law governs, it is clear that the only interest of the beneficiaries is a generic right to enforce the trust and that the trustee has the whole estate both legal and equitable including the right to possession and control of the corpus, *Whitney* v. *Hudson Trust Co.*, 234 N. Y. 394; *Schenck* v. *Barnes*, 156 N. Y. 316; *Matter of Wentworth*, 230 N. Y. 176. If Illinois law governs, the trustee has the legal estate and the right to possession and control of the corpus, *Altemeier* v. *Harris*, 403 Ill. 345, 86 N. E. 2d 229; *Anderson* v. *Williams*, 262 Ill. 308, 104 N. E. 659.

Singer cases was property actually owned by enemy aliens as we have shown in our discussion of those cases, *supra*. What is attempted to be vested here is essentially different.

The petitioner in an earlier proceeding in New York Courts demanded, under the 1945 Vesting Order, payment to him of the income and principal of the trust (R. 155-156). That relief was denied in a judgment entered January 30, 1948 (R. 156). The judgment was affirmed by the Appellate Division, 276 App. Div. 831; and affirmed by the Court of Appeals, 301 N. Y. 602. The finality of that judgment is no longer open to question. That judgment would be nullified if, by virtue of the April 6, 1953 Amended Vesting Order, the petitioner can now obtain a judgment directing payment of the income and principal of the trust to him. The prior judgment is *res adjudicata*. (*Schuykill Fuel Corp.* v. *Nieberg*, 250 N. Y. 304; *Baltimore S. S.* v. *Phillip*, 274 U. S. 351.)

To observe, as does petitioner (Petition, p. 16), that there is nothing in the Trading With the Enemy Act to suggest a privileged position for property held in trust is irrelevant. The Respondents rest on no claim of privilege. The Trial Court found as a fact that the trust fund and accumulated income is held by the Chase National Bank and is not property "payable to or deliverable to or claimed by" or held for or owned by any person but is to be held administered and disposed of by the Trustee as provided in the Trust Indenture for future distribution not to take effect earlier than the death of Bruno Reinicke, Jr. and his wife and all income is to be accumulated and added to the principal as provided in the Trust Indenture (R. 160). The Court also found as a fact

that at the time of the making of the Amended Vesting Order, dated April 6, 1953, the Respondent Hans Dietrich Schaeffer, grandson of Bruno Reinicke, Jr., was then in being, was an American citizen who has a contingent interest in the trust fund and its accumulated income and may become entitled to the entire principal and income upon termination of the trust (R. 159). That finding was made by a Court having supervision of the trust and there is nothing in the Trading With the Enemy Act which indicates any intent to deprive New York Courts of supervision or jurisdiction over trusts.

Though we are dealing with a trust here, the petitioner would persuade the Court that if he vests the *res*, it is exactly as though he were vesting a *res* consisting of an enemy alien's bank account. But a trust fund is not an enemy alien bank account. Here the trust was created in 1928 whereby property was transferred to a New York Bank; until the trust terminates, on the expiration of two lives in being, ownership is in the trustee. True the persons interested, some of them at least, and only some of them, are enemy aliens, but in the aggregate the entire rights of the enemy aliens, whether vested subject to being divested by death, whether contingent or a mere expectancy are certainly less than the ownership of the trust in its entirety. An American citizen has also a remainder interest. But take the entire fund from the trustee and you leave the beneficiary, if he happens to be an American citizen, without a remedy whereby he may establish his rights. As a contingent remainderman he cannot bring suit on rights as yet undetermined. *Koehler* v. *Clark*, 170 F. 2d 779; when the trust by its terms terminates his remedy has been

lost under a statute of limitations, 50 U. S. C. App. secs. 32, 33, *Pass* v. *McGrath,* 192 F. 2d 415, cert. den. 342 U. S. 910.

The trustee cannot bring suit under Section 9 (a) of the Act for return of the property because it has no beneficial interest in the property, *Central Hanover Bank* v. *Markham,* 68 F. Supp. 829. Petitioner cites (Petition, p. 16) two cases, *United States Trust Co.* v. *Hicks,* 16 F. 2d 286, and *Koehler* v. *Clark,* 170 F. 2d 779, as authorities for the proposition that a trustee may successfully maintain a suit under Section 9 (a) of the Act for the return of property. Neither decision supports such proposition. In the *Hicks* case (*supra*) the suit was brought by an ancillary administrator, c. t. a. who is a fiduciary but is not a trustee. In the *Koehler* case (*supra*), the Court dismissed a suit brought under Section 9 (a) of the Act by the trustees of a testamentary trust. The ground of the dismissal was that the trustees had "no litigable interest" in the trust, 170 F. 2d 779, 783.

The cases cited by petitioner (Petition, pp. 16-17), in support of his statement that the application of the seizure provisions of the Act to trusts has uniformly been sustained, upon examination fail to support any such sweeping declaration. *Central Trust Co.* v. *Garvan,* 254 U. S. 554, involved neither a testamentary nor an *inter vivos* trust: it involved monies of enemy alien insurance companies deposited with a bank to secure creditors and policy holders of those foreign insurance companies, which is a sort of fiduciary relationship essentially different from the *inter vivos* trust involved in the instant case. *In re Miller,* 281 Fed. 764, related to an application by the Cus-

todian for an order directing trustees to pay over *income payable to enemy aliens.* No attempt was made to seize the corpus of the trust. *Central Hanover Bank* v. *Markham,* 68 F. Supp. 829, was an action by a trustee under Section 9 (a) of the Act to recover securities which it had turned over to the Custodian and which formed part of the corpus of the trust. The Court granted the Custodian's motion for summary judgment on the ground that *all* beneficial interests in the trust belonged to enemy aliens and the trustee had no beneficial interest in the trust, but the Court indicated that its decision would have been different if one of the beneficiaries had been an American citizen (p. 831) and cited and distinguished *Isenberg* v. *Trent Trust Co.,* 26 F. 2d 609, on that ground. In *Keppelmann* v. *Palmer,* 91 N. J. Eq. 67, all the beneficiaries of the trust were enemy aliens: no American citizen had any beneficial interest in the trust.

Petitioner's position (Petition, pp. 15-17, R. 180) is that this Court, in the *Singer* and *Zittman* cases (*supra*), has construed the Act to mean that the Custodian by his mere fiat, embodied in a *res* vesting order, can seize "any property" even that of an American citizen and even though the remedy given by Section 9 (a) of the Act is illusory and inadequate. We respectfully submit that such an interpretation of the Act would authorize the Custodian to confiscate the property of an American citizen and would render the Act unconstitutional. It is elementary that a construction which would render a statute unconstitutional is to be avoided if possible. Apart from this, petitioner's interpretation is in flat contradiction to the construction placed upon the Act by this Court

in *Becker Co.* v. *Cummings*, 296 U. S. 74, 79, *Henkels* v. *Sutherland*, 271 U. S. 298, 301, *Kaufman* v. *Societe Internationale*, 343 U. S. 156, 160 and *Guessefeldt* v. *McGrath*, 342 U. S. 308, 319.

In *Becker Co.* v. *Cummings*, 296 U. S. 74, this Court stated (p. 79):

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by Section 9 (a) would be of doubtful constitutionality *if the remedy given were inadequate* to secure to the non-enemy either the return of his property or compensation for it." (Emphasis supplied.)

In *Henkels* v. *Sutherland*, 271 U. S. 298, this Court ruled (p. 301):

> "The Government * * * cannot confiscate the actual increment of property, belonging to a citizen * * * anymore than it can confiscate the property or its proceeds, without coming into conflict with the Constitution."

In *Kaufman* v. *Societe Internationale*, 343 U. S. 156, this Court ruled (p. 160):

> "The innocent stockholder may not have title to corporate assets but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies."

Finally, the construction urged by the Custodian is contrary to the long established holding of this

Court that federal courts do not have jurisdiction to oust state courts of possession and control of a *res* once the state courts have taken possession and control of such *res*, *Princess Lida* v. *Thompson*, 305 U. S. 456, *Commonwealth Co.* v. *Bradford*, 297 U. S. 613, 619. This holding has been applied by this Court to the Trading with the Enemy Act, *Markham* v. *Allen*, 326 U. S. 490, 494.

The judgment below preserved the rights established in the prior action and at the same time, went one step further for the protection of the Attorney General and directed in the judgment itself that "no payment of income, of principal or of accumulated income of the said trust shall be made to any beneficiary without 60 days written notice to the Attorney General of the United States to be given by registered mail" (R. 177). Consequently, upon the termination of the trust, should it eventuate that a national of an enemy country is entitled to any part of the corpus or income, the Attorney General may upon receipt of the notice directed to be given by this judgment, seize that which he is entitled to seize. The judgment takes nothing from the Attorney General because there is nothing owned by an enemy national at this time.

CONCLUSION

The decision below is in harmony with construction of the Act made by this Court. Hence the petition presents no substantial federal question and it should be denied with costs and disbursements to respondents.

Respectfully submitted,

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